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# IN THE
# COURT OF APPEALS OF INDIANA

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| MARY FRANCIS EDWARDS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 29A02-0610-PC-938 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0208-FB-47

**August 14, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Mary Francis Edwards appeals the denial of her petition for post-conviction relief

from her convictions for two counts of neglect of a dependant,[1] each as a Class B felony. She raises two issues, which we restate as:

I. Whether sufficient evidence was presented to support her conviction on Count 2, neglect of a dependant, because the State failed prove that Edwards knowingly deprived D.E. of food and nourishment and that the offense took place in Hamilton County; and

II. Whether Edwards received the effective assistance of counsel when trial counsel failed to object to evidence, move for judgment on the evidence for Count 2, and submit Edwards to a psychiatric evaluation for sentencing consideration.

We affirm.

## FACTS AND PROCEDURAL HISTORY

At approximately 10:00 a.m. on July 22, 2002, Edwards drove from her residence in Coatesville in Putnam County to Noblesville in Hamilton County to visit her parents. Her five-year old son, D.E., was a passenger in her truck. Edwards arrived at her parents' apartment at approximately 11:30 a.m. and parked her truck in the parking lot behind the apartment. Because her father did not want D.E. inside of the apartment, Edwards left D.E. outside in the truck while she went inside to visit her parents. It was a very hot day, and the high temperature was approximately ninety-six degrees. Edwards was inside of her parents' apartment for about an hour, and when she returned to the truck, she found D.E. unconscious in the bed of the truck. Edwards carried D.E. into the apartment, and a call was made to 9-1-1 at approximately 12:45 p.m. while she and her mother attempted to revive D.E.

Police officers and fire department medics responded to the dispatch and found D.E. unconscious, unresponsive with no pulse or respiration, and his skin was hot to the touch.

[1] *See* IC 35-46-1-4.

D.E. was transported to Riverview Hospital in Noblesville, where his core temperature was determined to be 108 degrees. Medical personnel in the emergency room attempted to revive D.E. and cool his core temperature. All efforts to resuscitate D.E. were unsuccessful, and he was pronounced dead at approximately 2:00 p.m. At an autopsy performed on July 23, 2002, D.E.'s cause of death was determined to be environmental hyperthermia, which is the prolonged exposure to high temperature. It was also determined that D.E. was dehydrated. Additionally, the autopsy showed that D.E. suffered from malnutrition and had little of the fat reserves present in children of his age. It was determined that the cause of this malnutrition was the lack of adequate outside nutrition.

After an investigation into D.E.'s death, Edwards was charged with two counts of neglect of a dependant, each as a Class B felony. She was convicted of both counts after a jury trial and sentenced to twenty years on each count to be served consecutively to each other. On September 15, 2003, Edwards filed a notice of appeal, but subsequently requested permission to remand the case in order to begin post-conviction proceedings. On July 23, 2004, Edwards filed a petition for post-conviction relief, which alleged ineffective assistance of trial counsel. The post-conviction court denied her petition on October 11, 2006. Edwards now appeals.

## DISCUSSION AND DECISION

Edwards used the Davis/Hatton procedure as outlined in Indiana Appellate Rule 37 to stay her direct appeal and pursue a petition for post-conviction relief in the trial court. *See*

*State v. Lopez*, 676 N.E.2d 1063, 1069 (Ind. Ct. App. 1997), *trans. denied* (citing *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149 (1977), and *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993)). After a full evidentiary hearing, if the petition for post-conviction relief is denied, then the direct appeal can be reinstated. *Id*. Then the issues determined in the post-conviction proceedings may be heard in addition to the issues initially raised in the direct appeal. *Id.* "'Once the petition for post-conviction relief is denied after a hearing, and the direct appeal is reinstated, the direct appeal and the appeal of the denial of post-conviction relief are consolidated.'" *Schlabach v. State*, 842 N.E.2d 411, 415-16 (Ind. Ct. App. 2006) (quoting *Williams v. State*, 757 N.E.2d 1048, 1058 (Ind. Ct. App. 2001), *trans. denied* (2002)).

## I. Sufficiency of the Evidence

Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Dickenson v. State*, 835 N.E.2d 542, 551 (Ind. Ct. App. 2005), *trans. denied*. We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*.; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if there is sufficient probative evidence to support the judgment of the trier of fact. *Dickenson*, 835 N.E.2d at 552; *Robinson*, 835 N.E.2d at 523.

Edwards argues that the State failed to present sufficient evidence to support her conviction for Count 2, neglect of a dependent. In order to convict Edwards of neglect of a dependent as a Class B felony under Count 2, the State was required to prove that Edwards, having the care of a dependent, whether assumed voluntarily or because of a legal obligation,

knowingly or intentionally deprived the dependent of necessary support, which resulted in serious bodily injury. IC 35-46-1-4. She concedes that sufficient evidence was presented to establish that D.E. was malnourished, but contends that the State failed to prove that she deprived D.E. of food and nourishment because no witness testified that Edwards was withholding nourishment from D.E. We disagree.

Although no direct evidence that Edwards deprived D.E. of food and nourishment was presented, "[a] verdict will be sustained based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt." *Gasper v. State*, 833 N.E.2d 1036, 1044 (Ind. Ct. App. 2005), *trans. denied* (citing *Maul v. State*, 731 N.E.2d 438, 439 (Ind. 2000)). The evidence presented showed that Edwards had sole custody of D.E. from January 1, 2002 until the day of his death. Prior to this, D.E. had been living with his father and paternal grandmother. While he lived with them, D.E. had a good appetite and gained weight. At the time of his death, D.E. weighed only 30.5 pounds, which was well below the fifth percentile of children his age. His autopsy revealed that D.E. was extremely malnourished and had very little, if any, of the fat reserves in his body that a well-nourished child would have present in his or her body. The doctor who performed the autopsy determined that the malnourishment was due to a lack of adequate food and nutrition. We conclude that the evidence was sufficient to support Edwards's conviction for neglect of a dependent.

Edwards also argues that the evidence was insufficient to support her conviction under Count 2 because of a lack of venue. Specifically, she contends that the State failed to prove that the crime occurred in Hamilton County. She claims that the evidence showed that, at the

time of the crime, she and D.E. lived in Coatesville, which was located in Putnam County,[2] and that no evidence was presented that she deprived D.E. of nourishment in Hamilton County during the relevant time period.

The right to be tried in the county in which the offense was committed is a constitutional and a statutory right. Ind. Const. Art. 1, § 13; IC 35-32-2-1(a); *Alkhalidi v. State*, 753 N.E.2d 625, 628 (Ind. 2001). Venue is not an element of the offense. *Alkhalidi*, 753 N.E.2d at 628. "Accordingly, although the State is required to prove venue, it may be established by a preponderance of the evidence and need not be proved beyond a reasonable doubt." *Id*. However, a defendant waives an alleged error relating to venue when he fails to make an objection before the trial court. *Floyd v. State*, 503 N.E.2d 390, 393 (Ind. 1987); *Critchlow v. State*; 346 N.E.2d 591, 597, 264 Ind. 458, 467 (Ind. 1976); *Smith v. State*, 809 N.E.2d 938, 941 (Ind. Ct. App. 2004), *trans. denied*.

Here, prior to and during the trial, Edwards made no objection to being tried in Hamilton County. She did not challenge the venue of the case at any stage of the proceedings below and raises this issue for the first time on appeal. "Although the Constitution guarantees a person charged with [a] crime a right to be tried in the county in which the crime was committed, this is a right personal to the defendant which he waives by failing to object." *Critchlow*, 346 N.E.2d at 597, 264 Ind. at 467. We therefore conclude that Edwards has waived review of this argument on appeal.

## II. Ineffective Assistance of Counsel

[2] Although Edwards states that she lived in Hendricks County, it appears that the address where she resided at the time of the crime was actually located in Putnam County.

Post-conviction proceedings do not afford the petitioner an opportunity for a super appeal, but rather, provide the opportunity to raise issues that were unknown or unavailable at the time of the original trial or the direct appeal. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied* (2002); *Wieland v. State*, 848 N.E.2d 679, 681 (Ind. Ct App. 2006), *trans. denied*, *cert. denied*. The proceedings do not substitute for a direct appeal and provide only a narrow remedy for subsequent collateral challenges to convictions. *Ben-Yisrayl*, 738 N.E.2d at 258. The petitioner for post-conviction relief bears the burden of proving the grounds by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

When a petitioner appeals a denial of post-conviction relief, he appeals a negative judgment. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002). The petitioner must establish that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.* at 391-92. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, and no deference is given to its conclusions of law. *Id*.

We review ineffective assistance of trial counsel claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wieland*, 848 N.E.2d at 681. First, the petitioner must demonstrate that counsel's performance was deficient, which requires a

showing that counsel's representation fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). Second, the petitioner must demonstrate that he was prejudiced by the counsel's deficient performance. *Id*. To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id*. A probability is reasonable if it undermines confidence in the outcome. *Id*.

We presume that counsel rendered adequate assistance and give considerable discretion to counsel's choice of strategy and tactics. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id*. The two prongs of this test are separate and independent inquiries, and thus, "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'" *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *cert. denied* (2000) (quoting *Strickland*, 466 U.S. at 697).

Edwards specifically argues that her trial counsel was ineffective for failing to: (1) object to Edwards's statement to D.E. sometime prior to the day of his death that, "[i]f you don't get your ass out of that truck, I'll leave you there for the animals to eat;" *Tr*. at 549; (2) object to evidence that Edwards colored D.E.'s hair because he looked so much like his father; (3) object to evidence of a bedroom in Edwards's home that smelled of urine and feces; (4) make a hearsay objection to a written statement made by a witness prior to the trial;

(5) object to a witness's testimony that Edwards did not like D.E. and that she called him a "f***ing a**hole;" *Tr*. at 533; (6) object to evidence of the temperature of the cab of the truck at 1:30 p.m.; (7) move for judgment on the evidence as to Count 2; and (8) seek a psychiatric examination of Edwards for consideration during her sentencing. She claims that these failures show that her trial counsel's performance fell below a standard of reasonableness and that the accumulation of errors rendered the result of the trial unreliable and fundamentally unfair.

"To succeed on a claim that counsel was ineffective for failing to make an objection, the defendant must demonstrate that if such objection had been made, the trial court would have had no choice but to sustain it." *Little v. State*, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), *trans. denied* (2005). As for trial counsel's failure to make certain objections to evidence, Edwards has not shown that had trial counsel made such objections, the trial court would have sustained them. Edwards's statement to D.E. about leaving him in the truck, the evidence that she colored his hair because he looked like his father, the evidence that a room in her house smelled of urine and feces, and the evidence that she did not like D.E. and had called him a "f***ing a**hole" were all relevant and provided insight into Edwards's motive to neglect D.E. and disposition toward him. Because evidence of motive is always relevant, any objections to the above evidence would have been overruled. *See Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2004).

Further, any objection to the witness's written statement as hearsay would have been overruled. The witness testified at the trial and was cross-examined by Edwards's trial counsel. The written statement was admitted to rebut the implication made during cross-

examination that the witness had fabricated the story. Indiana Evidence Rule 801(d)(1) states that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination, and the statement is consistent with the declarant's testimony and offered to rebut a charge of recent fabrication and made before the motive to fabricate occurred. Additionally, trial counsel's question on re-cross-examination, "I'm guessing, based upon your statement, that you were convinced that Ms. Edwards was responsible for him passing away, is that correct?" *Tr*. at 570, was a proper attempt to establish the bias of the witness.

As for the evidence of the temperature in the cab of the truck at 1:30 p.m., Edwards had not shown that an objection to this evidence would have been sustained. This temperature measurement was taken within an hour of D.E. being removed from the truck. Although no evidence was presented that established that the temperature at 1:30 p.m. would have been the same as when D.E. was inside of the truck, Edwards has not demonstrated how this evidence prejudiced her.

Edwards's trial counsel was also not ineffective for failing to move for judgment on the evidence as to Count 2. Edwards contends that there was no evidence to prove that she withheld nutrition from D.E. "[A] judgment on the evidence is properly granted only where there is a total absence of evidence as to the guilt of the accused or where the evidence is without conflict and susceptible to only one inference and that inference is in favor of the defendant." *DeWhitt v. State*, 829 N.E.2d 1055, 1063 (Ind. Ct. App. 2005). "If the evidence is sufficient to sustain a conviction upon appeal, then a motion for directed verdict is properly denied." *Proffit v. State*, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004), *trans. denied* (2005). Because we previously determined that the evidence was sufficient to prove that Edwards

withheld nutrition from D.E., we conclude that Edwards's trial counsel was not ineffective for failing to move for judgment on the evidence. Additionally, Edwards argues that her trial counsel should have moved for judgment on the evidence because the evidence did not show that Hamilton County was the proper venue. "'Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal.'" *Walker v. State*, 843 N.E.2d 50, 58 n.2 (Ind. Ct. App. 2005), *trans. denied* (2006), *cert. denied* (2007); *Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005); P-C.R. 1(8). Here, Edwards failed to address this specific argument in her petition for post-conviction relief. Therefore, this argument is waived.

Edwards's final contention is that her trial counsel was ineffective for failing to arrange a psychiatric evaluation of her to be considered at sentencing. Trial counsel's decision not have a psychiatric evaluation of Edwards conducted did not result in prejudice to Edwards. The pre-sentence investigation contained evidence of Edwards's mental condition and was considered by the trial court when it sentenced her. Additionally, the finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *O'Neill v. State*, 719 N.E.2d 1243, 1244 (Ind. 1999). Thus, because evidence of her mental condition was before the trial court during sentencing and because the trial court was not required to find Edwards's mental condition as mitigating, her trial counsel's failure to seek a psychiatric evaluation did not prejudice the outcome of her sentencing. For all of the above reasons, we conclude that Edwards's trial counsel was not ineffective, and the post-conviction court did not err in denying her petition for relief.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.